

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

**REPLY COMMENTS OF
MIDCOM COMMUNICATIONS INC.
ON ISSUES RELATED TO COURT REMAND**

MIDCOM Communications Inc. ("MIDCOM") hereby submits its reply comments regarding issues raised by the Commission's Public Notice^{1/} with respect to the D.C. Circuit's remand of the pay phone compensation orders.^{2/} MIDCOM agrees with the many commenters that interpret the court's remand as effectively invalidating the first year of the Commission's interim payphone compensation scheme. These commenters are correct that this invalidation results in the reinstatement of the prior compensation obligation of \$6 per payphone per month. At the very least, commenting parties have demonstrated the need for a reduction in the interim compensation rate based on the lower costs of providing coinless calls. Should the Commission decide to revise the interim plan, MIDCOM believes that the court's remand decision also

^{1/} "Pleading Cycle Established for Comment on Remand Issues in the Pay Phone Proceeding," DA 97-1673, released Aug. 5, 1997.

^{2/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20 1996) ("Pay phone Order"); Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996 ("Order on Reconsideration") (collectively, "Pay phone Orders"); remanded *sub nom.* *Illinois Public Telecommunications Assn. v. FCC and United States*, Case No. 96-1394 (D.C. Cir., July 1, 1997).

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requires that the Commission include as payors all carriers who receive compensation from coinless calls placed from payphones, including local exchange carriers ("LECs") and interexchange carriers ("IXCs").

With respect to the permanent compensation plan, the Commission should reduce per-call compensation to a rate between \$.057 and \$.11 per call, based on the lower cost of providing coinless calls as compared with coin calls.

I. The Court's Remand Has Irretrievably Nullified the First Year of the Interim Compensation Plan

The Commission has asked for comments on how the interim compensation plan should be revised to satisfy the court's remand. Many commenters correctly stated that the effect of the court's decision was to invalidate the first year of the interim plan. Indeed, the majority of carriers disputed the Commission's legal authority to continue imposing the interim obligation on carriers^{3/} and urged the Commission to abandon altogether the interim compensation plan in favor of setting permanent compensation rates quickly.^{4/}

Several parties argued against broadening interim payment obligations retroactively. For example, the Competitive Telecommunications Association ("CompTel") claimed that the Commission lacks the legal authority to impose an interim compensation obligation on IXCs excluded from the FCC's original interim compensation scheme.^{5/} Similarly, Worldcom believes

^{3/} Comments of CompTel at 3-8, Frontier Corp. ("Frontier") at 9-10, MCI Telecommunications Corp. ("MCI") at 6-7, Cable & Wireless, Inc. ("CWI") at 4, LCI Int'l ("LCI") at 8, Personal Communications Industry Ass'n at 2-7, and Airtouch Paging at 3-5.

^{4/} Comments of Frontier at 9-11, MCI at 6, CWI at 13, LCI at 3-4, and Worldcom, Inc. ("Worldcom") at 3-5.

^{5/} Comments of CompTel at 3-4.

there is no lawful basis for the Commission to apply its interim or a new per-phone rate retroactively.^{6/} American Public Communications Council ("APCC") contended that the filed rate doctrine and the rule against retroactive rate making prohibit retroactive modification of previously-approved rates.^{7/}

Given the procedural posture of the FCC's orders, it is far from plain that the Commission has the authority to impose retroactive interim compensation obligations on the carriers it previously excluded. Thus, the Commission cannot now rectify defects the court found in the interim plan. MIDCOM concurs with CompTel who argued that carriers are not obligated under section 276 of the Act to pay compensation in the absence of valid FCC rules on remand.^{8/} As a result, the Commission should abandon efforts to revive or expand the interim plan and instead move expeditiously to implement a permanent compensation plan that is fair to both payees and payors.

As the compensation rate adopted by the Commission for coinless calls has been rejected by the court, MIDCOM agrees with the CompTel and MCI arguments that the rate that should apply for compensation during the interim period is \$6 per payphone.^{9/} This rate was in effect prior to the Commission's adoption of the invalidated order and continues in effect until the Commission adopts a valid and justified rate for permanent compensation. Likewise,

^{6/} Comments of Worldcom at 8.

^{7/} Comments of APCC at 18.

^{8/} Comments of CompTel at 2.

^{9/} Comments of CompTel at 9-10 and MCI at 6.

MIDCOM's exemption from the obligation to pay compensation because it is not an operator services provider is also reinstated.^{10/}

However, in the event the Commission decides instead to revise the interim compensation plan, MIDCOM supports the proposals of several carriers that argue that the rate should be reduced to reflect the cost of providing coinless calls. This approach would be consistent with the court's ruling that the Commission's decision on coinless rates was fatally flawed in its failure to consider cost data presented in the underlying proceeding.

If the Commission is inclined to modify the per-call compensation rate on an interim basis, MIDCOM recommends that the Commission employ the rate it adopts for permanent compensation.^{11/} As discussed below in more detail, this default compensation rate should fall between the range of \$.057 and \$.11 per call.

^{10/} The Commission granted MIDCOM's request for an exemption from the payment obligation for the period April 1, 1996 until November 5, 1996. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Memorandum Opinion and Order, 12 FCC Rcd 2571 (1997). This exemption should continue to apply until the Commission adopts a valid compensation plan in this remand proceeding.

^{11/} Moreover, if the Commission were to identify a legal basis on which to revise the first year of the interim plan, it should include all carriers with revenues from coinless calls placed from payphones. A number of parties agreed with MIDCOM that any modified interim plan must include all carriers and must allocate payment responsibilities in proportion to the number of compensable calls received by each carrier. Comments of CompTel at 14-16, LCI at 9-10, AT&T at 20, MCI at 3, Sprint at 12, Excel Telecom. and Telco Comm. Group at 6, General Communication Inc. at 2-3, Comm. Central, Inc. at 22-23, Telaleasing Enterprises, Inc. at 11, and RBOCs/GTE/SNET at 34. Furthermore, the court's remand requires no less than an inclusion of all carriers which could have completed compensable calls during the first year of interim compensation. Slip Op. at 17.

II. The Commission Should Establish a Fair, Cost-Based Rate for Permanent Per-Call Compensation

Considering the foregoing discussion, MIDCOM supports the recommendation by commenters that the Commission focus its short-term efforts on designing a permanent plan that is fair to payors as well as to payees.^{12/} As stated in MIDCOM's initial comments, the court required the Commission to consider the actual costs of coinless calls in establishing a default rate for coinless calls. Consequently, the Commission should reduce the per-call compensation rate. In this regard, MIDCOM notes the range of evidence presented by Sprint, AT&T and Frontier showing that the rate for permanent compensation should be reduced to between \$.057 to \$.11 per call.^{13/}

Several commenters argued that the FCC should calculate a new default compensation amount based on a reasonably efficient PSP's cost of originating access code and subscriber 800 calls.^{14/} AT&T demonstrated that a fair cost-based compensation rate for coinless calls is \$.11 per call.^{15/} AT&T based this calculation on the average of operating its own coinless payphones, with revisions to reflect the costs PSPs "even arguably incur to operate coinless phones." AT&T applied the total costs of \$76.85/month to 700 total calls per coinless payphone per month and arrived at \$.1098 per call. Frontier stated that the Commission should set a rate in the range of

^{12/} Comments of CompTel at 10-13, Frontier at 3-6, MCI at 6, CWI at 14, LCI at 4, and Worldcom at 2-3.

^{13/} Comments of Sprint at 11, AT&T at 6 and Frontier at 2.

^{14/} Comments of CompTel at 10-11, LCI at 3-4, Sprint at 3-6 and CWI at 5-11.

^{15/} Comments of AT&T at 6.

\$.10 per call, based on record evidence showing that the cost of originating these calls is between \$.0595 and \$.1073.^{16/}

MIDCOM supports Sprint's recommendation that the Commission set the per-call rate at \$.057 per call.^{17/} Sprint's examination of cost-related information has revealed that New England Telephone ("NET") is an efficient PSP and could be used as a surrogate for costs of coinless calls. Sprint reported that NET's total costs of providing local coin service are \$.167 per call. From this amount, Sprint subtracted costs not attributable to coinless calls, noting that the FCC has determined that the costs of coin functionality and local call completion total \$.11 per call. Thus, MIDCOM urges the Commission to set the per-call rate at \$.057 per call.

The RBOCs/GTE/SNET argued that their costs for coinless calls would increase by as much as \$.08 per call, primarily due to the requirement to send Automatic Number Identification digits to identify these calls.^{18/} However, such an increase would not be warranted because the costs of administering per-call compensation imposes an equally heavy burden on the carriers obligated to track calls and make payments. These respective costs would likely balance each other and, therefore, the Commission should not increase the compensation rate based solely on the unverified assertion of these PSPs.

^{16/} Comments of Frontier at 6-9.

^{17/} Comments of Sprint at 11.

^{18/} Comments of RBOCs/GTE/SNET at 17-19.

III. Conclusion

MIDCOM recommends that the Commission forego any attempt at revision of the interim compensation rate and instead recognize that the court's invalidation of the first year of the interim plan requires reinstatement of the \$6 per payphone rate that was in effect prior to adoption of the invalidated orders. Alternatively, MIDCOM requests a reduction in the interim compensation rate based on the lower costs of providing coinless calls. The Commission should use the reduced rate it adopts for permanent per-call compensation -- a rate between \$.057 and \$.11 per call -- for any such revised interim rate.

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